

**STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE PUBLIC UTILITIES COMMISSION**

In the Matter of the Application of Otter  
Tail Corporation d/b/a/ Otter Tail Power  
Company for Authority to Increase Rates  
for Electric Utility Service in Minnesota

**ORDER GRANTING MOTION TO  
STRIKE OR EXCLUDE**

This matter is before Steve Mihalchick, Administrative Law Judge, on a motion filed by Otter Tail Power (OTP) on May 13, 2008. OTP moved to strike or exclude tables from the reply brief of the Office of the Attorney General's Residential Utilities Division (OAG). The Administrative Law Judge directed the parties to file responses no later than Friday, May 23, 2008.

The OAG filed its responsive brief on May 23, 2008. No other parties submitted responses to OTP's motion.

Based upon the filings of the parties and the record in this matter, and for the reasons set forth in the memorandum that follows, the Administrative Law Judge makes the following:

**ORDER**

IT IS HEREBY ORDERED THAT OTP's motion to strike Tables 1-4 and the related discussion of that information in the OAG's Reply Brief is **GRANTED**.

Dated: May 28, 2008

/s/ Steve M. Mihalchick  
STEVE M. MIHALCHICK  
Administrative Law Judge

## MEMORANDUM

OTP's objections to the contents of the OAG Reply Brief are: 1) that it seeks to introduce substantive evidence after the close of the evidentiary record; and 2) that there is no substantial evidentiary support in the record for a determination of the Return on Equity ("ROE") using the information in Tables 1-4 and the related portion of the OAG's Reply Brief.

### **The Information Offered Is Not Subject to Cross-Examination**

As OTP points out, the OAG Reply Brief analysis of ROE relying on updated information was not introduced into the hearing record through a witness subject to cross-examination.<sup>1</sup> The OAG responded that the ALJ has allowed parties to offer newly developed evidence into the record subsequent to the filing of the pre-filed testimony of that witness. Specifically the OAG cited:

A prime example is Exhibit 116, in which OTP witness Rogelstad introduced seven pages of additional Q and A testimony. When counsel for Enbridge Energy, Limited Partnership and Enbridge Energy Company, Inc. ("Enbridge"), joined by the OAG and the Minnesota Chamber of Commerce, objected to the inclusion of Rogelstad's discussion of a facility-by-facility analysis of OTP's system and the analysis itself (Exhibit 118), which was provided on the afternoon before the hearing, the ALJ denied the motion to strike because the study "was done in response to an issue raised."<sup>2</sup>

The OAG maintains that its additional information was offered in response to an issue raised by OTP. OTP maintained that the ROE proposed by Mr. Kaml is based on data that has not been updated. This lack of updating is cited by OTP as one of the reasons that the OAG-proposed ROE should not be adopted.

There are two critical differences between the OAG's example and the current situation. First, Mr. Rogelstad was subject to cross-examination regarding the substance of Exhibit 116. Second, the information was allowed into the record at the hearing. By contrast, the Tables and related information were not offered at the time of the hearing and no opportunity exists for any cross-examination regarding how the update was performed.

Both the statute and the rule governing contested case proceedings guarantee that each party will have the right of cross-examination of witnesses.<sup>3</sup> The right of cross-examination is essential to insuring due process in a contested case proceeding.<sup>4</sup> Allowing the tables and related information to come into the record as the factual basis

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<sup>1</sup> OTP Motion, at 4 (<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=5204274>).

<sup>2</sup> OAG Response at 2 (<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=5229993>).

<sup>3</sup> Minn. Stat. § 14.60, subd. 3; see Minn. R. 1400.7100, subd. 1.

<sup>4</sup> See *Goldberg v. Kelly*, 397 U.S. 254, 269-270 (1970).

of the OAG's ROE figure would deny the parties to this rate case their right of cross-examination.

The OAG maintains the lack of cross-examination is not a bar to accepting the Tables and related information. The OAG contends that the updated analysis is only offered "[t]o dispel any perception that updating the OAG's DCF analysis to reflect stock information that occurred after Direct Testimony had been filed would result in a different ROE recommendation . . . ."<sup>5</sup> This information is offered only to show that there would be no difference between the OAG ROE as proposed and the ROE as updated to include data from beyond the test period.<sup>6</sup>

While the ALJ is sympathetic to the OAG position in regard to the limited role of the evidence, admission of the Tables and related information would tend to reinforce the evidence that was actually relied upon at the hearing. The offer of such evidence must come with the opportunity to cross-examine. The OAG's effort to limit the basis for accepting the evidence does not cure the procedural defect that prevents the admission of that evidence.

### **The Information Offered Is Not Part of the Hearing Record**

OTP maintains that the Tables and related information cannot be placed in the record after the hearing concluded. OAG responded that it is

All evidence . . . which is offered into evidence by a party to a contested case proceeding, shall be made a part of the hearing record of the case. No factual information or evidence shall be considered in the determination of the case unless it is part of the record.

While the hearing record is part of the contested case record, that does not make all of the contested case record part of the hearing record. The hearing record is comprised of factual information accepted into the record and argument based on that factual information. The factual information to be relied on in argument must be introduced into the record where the opportunity to answer that evidence is available. Failure to limit the decision making process to identified facts in the record can lead to the decision being vacated on review.<sup>7</sup> The hearing in this matter concluded on April 7, 2008. The information offered was submitted on May 6, 2008. Absent agreement of the parties or reopening of the hearing, this new information cannot be accepted into the record.<sup>8</sup>

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<sup>5</sup> OAG Response at 3 (quoting OAG Reply Brief at 5).

<sup>6</sup> *Id.*

<sup>7</sup> See *Hard Times Cafe, Inc., vs. City of Minneapolis, et al.*, 625 N.W.2d 165 (Minn. App. 2001) (<http://www.lawlibrary.state.mn.us/archive/ctappub/0104/c4001060.htm>).

<sup>8</sup> In its Response, the OAG formally requested that Tables 1-4 and the associated discussion be included in the record in this case as a late-filed exhibit. The Tables and related information are not in the form of an exhibit, and the underlying methodology leading to the specific results presented is not thoroughly described. This makes impossible any reasonable assessment of the foundation of the exhibit and what

## **The Commission's Authority to Consider Exceptions Does Not Affect the Hearing Record Before the ALJ**

The OAG cites the recent consideration of the sale of Interstate Power and Light's ("IPL") transmission assets to ITC Midwest ("ITC") as the Commission's rejection of the proposition that any bar exists to "the introduction new evidence at this stage or even later stages of contested case proceedings."<sup>9</sup>

The Commission, as the ultimate decision making authority in this proceeding, follows Minn. Stat. § 14.61, subd. 2, which states:

In all contested cases where officials of the agency render the final decision, the contested case record must close upon the filing of any exceptions to the report and presentation of argument under subdivision 1 or upon expiration of the deadline for doing so.

The Commission has a well established procedure for providing notice for exceptions to be filed and often affords oral argument to the parties as part of that procedure. The Commission has interpreted the foregoing statutory language as follows:

The Administrative Procedure Act requires that agency decisions in contested cases be based only on evidence in the record. [footnote omitted] It prohibits agencies from considering factual information or evidence outside the record, and it provides that the record is closed as of the date that the parties present post-hearing argument to the agency. [footnote omitted].<sup>10</sup>

The OAG is correct that the Commission can accept new evidence through the period for exceptions and oral argument. The Commission's authority does not change the limitations on parties before OAH in these proceedings. The ALJ is not the final decision maker. The process in place for creation of the hearing record limits new evidence (subject to the exceptions listed above) to that which is offered through the hearing and for which the opportunity for cross examination exists. These limitations ensure that all parties are able to address factual issues in a timely and reasonable manner. Allowing factual assertions to come into the record through the briefing process precludes parties from challenging those assertions, as they have the right to do. The Tables and related information do not meet the requirements for inclusion in the record and are appropriately stricken.

S.M.M.

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weight, if any, to give that exhibit. In the absence of an agreement of the parties and for the reasons discussed in this Memorandum, that request is denied.

<sup>9</sup> OAG Response at 3

<sup>10</sup> *ITMO the Joint Petition for Approval of the Transfer of Transmission Assets of Interstate Power and Light Co. and ITC Midwest LLC*, Docket No. E-001/PA-07-540, at 29-31 (Commission Order Approving Transfer of Transmission Assets, with Conditions issued February 7, 2008) (<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=4928313>).